

ZONING BOARD OF APPEALS
SOMERS, CONNECTICUT
APPLICATION FOR HEARING

RECEIVED

MAY 14 2020

\$360.00 NON-REFUNDABLE APPLICATION FEE
\$100.00 for each additional variance request.

BY: J Roy
LAND USE DEPT.

Application Number: 20-003

Date May, 2020

Applicant Amy L. Eastman

Phone 860-749-0797 (Attorney John E

Applicant E-mail john@jhparkslaw.com (Attorney John Parks)

Address 352 Billings Road Somers, CT 06071 (Attorney John Parks)

Location of Property 42 Hallie Lane Somers, CT 06071 Zone A A1 B I (CIRCLE)

Owner of Record Amy L. Eastman

Address 40 Hallie Lane Somers, CT 06071

Deed Reference Volume 284 Page 988

☒ Variance ☒ Appeal of Decision ☐ Other

Zoning Section

Description of request: Appeal Cease & Desist Order (ex: side yard, height, front yard)

Clearly state why you are requesting a variance for this property and explain what hardship exists/applies for this case. Also, please provide a pertinent sketch or blueprint of proposed variance.

The undersigned, on behalf of Amy L. Eastman, hereby appeals a Cease & Desist Order issued by Jennifer Roy, Somers Zoning Enforcement Officer dated April 16, 2020 copy of which is attached hereto.

As to Variance see the attached.

Signature [Signature]

All applicants hereby certify that they are the _____ owner of record for the above referenced property or they are an appointed representative of the _____ owner of record with permission to act on behalf of the property owner.
(Please check one)

OFFICE USE ONLY

Decision Date _____

Decision:

Conditions:

This is an appeal for a variance in the alternative in connection with the Appeal of Decision. The property owner, Amy L. Eastman, does not concede that this lot is subject to any discretionary zoning approval for her proposed activities, but because the Zoning Commission and the Zoning Enforcement Officer believe otherwise, she respectfully requests that the Zoning Board of Appeals determine and vary the application of the zoning regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values solely with respect to this parcel of land where, owing to conditions especially affecting this parcel but not affecting generally the district in which it is situated, a literal enforcement of such regulations would result in exceptional difficulty or unusual hardship so that substantial justice will be done and the public safety and welfare secured.

Specifically, this parcel, as shown on the attached plan, contains a substantial area of rock outcrop that precludes the orderly development of the lot for its single-family residentially use. The rock outcrop is a unique, natural feature, not typically found on other lots in the area. Amy Eastman did not create the exceptional difficulty or unusual hardship. It came with the land. The presence of rock is a proper basis for the granting of a variance. See *Rodenstein v. Board of Appeal of Boston*, 149 N.E.2d 382, 337 Mass. 333 (1958). <https://tinyurl.com/rockvariance>

The requirements for granting a variance are described generally in Rathkopf's Law of Zoning and Planning:

57:13. Generally: Hardship and practical difficulty

The function which a board of appeals is most often called upon to exercise is the power to pass upon applications for variances. The statutory standards for the exercise of that power are expressed in different ways; most states follow the language of the model state enabling act, which refers only to cases of "unnecessary hardship" without mention of cases of "practical difficulty."¹ However, situations in which practical difficulties appeared have been found by the courts to present the hardship and have been decided

¹ Standard State Zoning Enabling Act §7, reprinted in Vol. 5. However, the enabling acts of some states refer to "difficulty" as well (e.g., New York, Delaware, Utah, and North Dakota). The Pennsylvania Supreme Court defines "unnecessary hardship" in the context of use variances as being "established by evidence that: (1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) the property can be conformed for a permitted use only at a prohibitive expense; or (3) the property has no value for any purpose permitted by the zoning ordinance." *Marshall v. City of Philadelphia*, 626 Pa. 385, 97 A.3d 323, 329-30 (2014). The Supreme Court of Alabama holds "An 'unnecessary hardship' sufficient to support a variance exists where a zoning ordinance, when applied to the property in the setting of its environment, is 'so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property.'" *McQuillin Law of Municipal Corporations* (3d ed.) §25.167. *Ex parte Chapman*, 485 So. 2d 1161, 1162 (Ala. 1986) (citation omitted).

See generally Variances Ch 58 at §§58:5 to 58:8, *infra*.

under that rubric. While the hardship involved in being unable to use property for a specific permitted use which is particularly desired to be made of the property—because collateral regulations pertaining to the size of the lot, or the bulk or location of structures thereon, cannot be complied with—may not be the same kind of or as severe as the hardship incurred where no permitted use may be made of it, frustration of the owner's otherwise lawful intentions may well constitute hardship. Not all hardship is based entirely on financial loss.²

Practical difficulty and hardship tend to overlap.³ The Supreme Court of New Jersey has pointed out that there is no practical difference between the two concepts: "where 'peculiar and exceptional practical difficulties' exist, so logically does undue hardship."⁴ A Delaware trial court judge described one way of differentiating the two:

A variance from a setback requirement is an area variance that addresses the exceptional practical difficulty in using a particular property for a permitted use. An exceptional practical difficulty is present where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on the neighboring properties if the variance is granted. An applicant for a special use variance bears a heavy burden of showing unnecessary hardship, since it is recognized that a prohibited use, if permitted, would result in a use of the land in a manner inconsistent with the basic character of the zone. The "unnecessary hardship" test is more burdensome to overcome than the "exceptional practical difficulty" test.⁵

² 347 Humphrey Street, LLC v. Board of Zoning Appeals of City of New Haven, 160 Conn. App. 214, 125 A.3d 272 (2015) (economic hardship alone is insufficient to support a variance); Chambers v. Smithfield City, 714 P.2d 1133, 1135 (Utah 1986) (hardship is not demonstrated by economic loss alone. It must be tied to the special circumstances, none of which have been proven here.); see also Vinson v. Medley, 1987 OK 41, 737 P.2d 932 (Okla. 1987).

³ Loyola Federal Sav. and Loan Ass'n v. Buschman, 227 Md. 243, 176 A.2d 355, 358-59 (1961) (citing this treatise 3d ed.).

⁴ 165 Augusta Street, Inc. v. Collins, 9 N.J. 259, 87 A.2d 889 (1952). And see generally Variances Ch 58 at §§58:5 to 58:8, *infra*.

Connecticut. Jersey v. Zoning Bd. of Appeals of City of Derby, 101 Conn. App. 350, 921 A.2d 683 (2007) (overruled by, E and F Associates, LLC v. Zoning Bd. of Appeals of Town of Fairfield, 320 Conn. 9, 127 A.3d 986 (2015)), (holding that zoning ordinance cannot preempt state statute on hardship required for dimensional variance).

⁵ Riker v. Sussex County Board of Adjustment, 2015 WL 648531, *2 (Del. Super. Ct. 2015) (citations omitted).

All that Amy Eastman wants to do is break up the rock outcropping by mechanical means. No blasting will be used. She will take this broken up rock and soil around it and regrade the lot to make it usable. Some rock will be used to make stone walls, typical of the New England landscape, just as farmers did centuries ago. Some rock will be used for stone foundations of new accessory structures. No rock or will be brought onto the properties. No rock or soil will be removed from the properties. There will be no impact on the neighborhood from trucks coming to and going from the properties.

Breaking up the rock outcrop and regrading will enable Amy Eastman to create play areas of her children, construct as-of-right accessory uses such as a gazebo, a woodshed, and a barn. The removal of the rock and regrading with the soil will make it possible for Amy Eastman to make economic use of her residential properties. The use is and will remain single-family residential. The use before and after the work will be consistent with the zoning classification. The work will improve the property and enhance values in the area.

What Amy Eastman requests in this variance is exactly what scores of lot owners and lot developers, maybe hundreds of them, have done in town for decades with no approvals required. It is not a mining operation and it is not a commercial venture. Amy Eastman owns a single-family residential lot and wants to use it for that purpose only.

Amy Eastman is amenable to conditions on the approval of a variance including hours of work Monday to Friday from 7 AM to 6 PM, 7 AM to 5 PM on Saturday and no work on Sunday. She also agrees to allow the town zoning officer to inspect the work.

TOWN OF SOMERS
Office of Zoning Enforcement
600 Main Street
Somers, CT 06071

CEASE AND DESIST ORDER

April 16, 2020

VIA: Certified and Regular Mail

Amy L. Eastman
40 Hallie Lane
Somers, CT 06071

RE: 42 Hallie Lane, Somers, CT

Dear Ms. Eastman,

Please be advised that you are found to be in violation of the Somers Zoning Regulations as follows:

§ 214-5. Applicability; conformity with regulations required; prohibited uses. [Amended 6-3-1991, effective 6-17-1991]

The regulations set by this chapter within each district shall be minimum regulations and shall apply uniformly to each class or kind of structure or land, and particularly provided that no land, building, structure or premises, or part thereof, shall hereafter be used or occupied, and no building or part thereof or other structure shall be erected, constructed, reconstructed, extended, enlarged, moved or altered, except in conformity with all of the regulations herein prescribed for the zone in which it is located. Uses that are not expressly permitted are prohibited.

ARTICLE XII Earth Removal and Filling

§ 214-66 Purpose.

The purposes of this article are to preserve a cover crop on the land, to prevent erosion and to control any excavation or filling operations that may create a safety or health hazard to the public or the nearby property owners or be detrimental to the immediate neighborhood or to the Town of Somers.

§ 214-67 Special use permit required.

No excavation or removal of sand, gravel, clay, soil, humus, quarry-stone, rock or other earth materials and no filling of land shall be allowed in any zone without a special use permit, except as hereafter provided.

§ 214-68 Exemptions.

A special use permit shall not be required for the necessary and incidental excavation or removal of 1,000 cubic yards or less of material on or from a lot or parcel, or for any filling activity, only if such activity occurs in connection with one of the following:

- A. A bona fide construction or alteration of a structure for which a zoning permit or special use permit has been issued and the amount of material to be removed or filled has been approved by the Commission. Topsoil or loam may only be removed to the extent necessary to allow permitted building or other construction activities. Such topsoil or loam shall be retained on the property and shall be re-spread on the property following the completion of construction activities. Such topsoil and loam shall then be reseeded or otherwise stabilized to prevent erosion. Topsoil or loam may be removed from the property only if the applicant demonstrates to the Zoning Commission that such materials cannot be practically reused on the property.
- B. The landscaping of a lot having one or more existing structures.

- C. Normal agricultural operations.
- D. The construction of ponds for agricultural or conservation purposes, provided that the material removed is left on the site, that the excavation or construction does not affect any watercourse or wetlands drainage or flow and will not cause soil erosion or sedimentation problems and that any other state or municipal permits required for such activity have been issued.
- E. A bonded or otherwise secured subdivision approved by the Planning Commission.

§ 214-69 Site plan requirements.

In addition to any other requirements for site plans under these regulations, the site plan for an excavation, removal or filling activity shall include the following information:

- A. Location of area to be excavated or filled and proposed commencement and completion dates.
- B. A detailed statement of the nature, extent, timing and purpose of the operation.
- C. Depth of existing topsoil at various locations.
- D. Depths to water table before and after the operation.
- E. Proposed truck routes. Access and egress to and from the property must be at least 100 feet from side and rear lot lines.
- F. Proposed truck circulation within the property.
- G. Existing and proposed drainage on the premises.
- H. Proposed measures for control of runoff, soil erosion and sedimentation.
- I. Existing topographic contour lines on the premises and proposed final contour lines resulting from the intended excavation, removal or filling, shown on a map, drawn to scale of not more than 40 feet to the inch, and with contour intervals of no greater than five feet. Contour lines must be shown for all areas within, and within 100 feet of, the site of the proposed excavation, removal or filling.
- J. All existing buildings or structures on the site and any buildings, structures or uses being applied for.
- K. Surrounding properties and streets.

§ 214-70 Issuance and renewal of special use permit.

- A. The Zoning Commission may issue or renew a special use permit for excavation, removal or filling operations involving earth products and shall establish an expiration date for any special use permit issued pursuant to this article which shall not exceed one year from the date of issuance. This special use permit shall be filed in accordance with § 214-102H(6) of these regulations prior to commencement of any operations.
- B. The Zoning Commission may renew a special use permit if it determines that the operation, as carried on, is in compliance with these regulations and with any and all conditions set forth in the permit. No special use permit shall be renewed until the Commission or its authorized agent has inspected the work under the previous permit. A project may be divided into stages and approval shall be required by the Commission before each stage is undertaken if deemed necessary or desirable by the Zoning Commission. [Amended 4-16-2001, effective 5-12-2001]
- C. No special use permit shall be issued or renewed pursuant to this article unless the following conditions are met:
 - (1) The activity shall not result in the creation of any sharp declivities, pits or depressions, soil erosion, soil fertility problems or permanently depressed land values, or create any drainage or sewage problems or other conditions which would impair the use or reuse of the property or neighboring property in accordance with these Zoning Regulations or which would create a nuisance.
 - (2) The activity shall be in harmony with the general purpose and intent of these regulations and shall not have an adverse affect on any existing or potential surface water or groundwater supplies.
 - (3) The premises shall be excavated and graded in conformity with the proposed plans as approved.
 - (4) During the period of excavation and removal, adequate barricades and/or woven fences with middle posts, four feet in height, shall be erected for protection of vehicles and pedestrians.
 - (5) No heavy equipment other than for digging, leveling, loading and carting excavated material shall be used on the site, and no material shall be processed on the site, unless permission, in writing, is first obtained from the Zoning Commission.
 - (6) At all stages of operation, proper drainage will be provided to avoid the occurrence of stagnant water and to prevent interference with and contamination of surface water and groundwater.
 - (7) During and after the excavation, removal or filling, the site shall be cleared of debris.

- (8) Silt and sediment shall not be permitted to run off the site and settlement basins shall be used to control sedimentation.
- (9) All arable soil from any excavation or fill area shall be set aside and retained on the premises, and shall be respread over the affected area and permanently seeded upon completion of the entire operation or any part thereof.
- (10) Unless a plan for removal is coordinated with the owner of an adjacent tract and approved by the Commission, no activity involving or related to the removal of earth materials or the filling of land shall be conducted nearer than 100 feet from any property line. If the final grade of any excavated or filled area will be below the established elevation of a street, no activity involving or related to the removal of earth materials or the filling of land shall be conducted nearer than 100 feet from such street line. Such prohibited activities include, but are not limited to, excavation, removal, stockpiling and clearing. Measurement shall be made from the property line or street line, as appropriate, to the nearest point of such removal, filling or other activity. [Amended 6-15-1998, effective 7-1-1998]
 - (a) In areas in which the natural vegetation within any such one-hundred-foot buffer area is not, in the opinion of the Commission, sufficient to provide screening of adjacent properties or streets from dust, noise, erosion, drainage or other potential problems arising from the activity, the Commission may require that suitable plantings or other screening be provided by the applicant.
 - (b) Notwithstanding the foregoing provisions, the Commission may allow any buffer area to be crossed by a driveway or other accessway not to exceed 28 feet in width and as close to 90° through the buffer area as possible if such access is necessary to allow the conduct of the proposed activity, or if it would be more reasonable and prudent than any alternative access. The length, cost, location and other characteristics of any alternative access may be considered by the Commission in determining whether such access would be more reasonable or prudent.
- (11) Earth products removal operations shall not be permitted to excavate to a depth any closer than five feet above the site's high-water table.
- (12) Proper measures shall be taken to minimize the generation of dust on access roads or driveways, and to minimize the nuisance of noise, flying dust and rocks, both on and off the premises, including any nuisance created by trucks hauling away or delivering material. If considered necessary by the Zoning Commission, a limitation may be placed upon the stockpiling of excavated or fill material. Local streets shall be kept clean by the permittee of the bank at all times.
- (13) Upon completion of an approved operation, the final grades in any area excavated or filled shall not be steeper than three to one (3:1), horizontal to vertical, or whatever lesser slope is necessary to maintain stability under particular soil conditions, and this area shall be covered with not less than six inches of topsoil, and, unless put under cultivation, it shall be treated with two tons of lime per acre, 1,000 pounds of 10-10-10 fertilizer per acre and permanently seeded. A permanent grass mixture and/or trees spaced apart not more than seven feet on center shall be planted on the re-stabilized area. These plans shall be referred to the Tolland County Soil Conservation District for recommendations.
- (14) Machines and trucks working in, to and from the pit area shall be properly muffled and covered at all times.
- (15) All trucks shall be required to take the shortest distance to a state road.
- (16) Topsoil or loam shall not be removed from any property except in accordance with § 214-68.
- (17) The site will be subject to continuously conform to the State of Connecticut Guidelines for Soil Erosion and Sediment Control, as amended.

§ 214-71 Blasting; operation standards and hours.

- A. Blasting for the removal of earth products shall not be permitted unless written approval is granted by the Zoning Commission and any other local or state agency having jurisdiction over blasting operations. An applicant for any activities involving blasting shall be required to show that the blasting will not cause a nuisance or damage to nearby property.
- B. At no time shall more than one undivided area, which area shall not exceed three acres in size, be opened within the lot, it being the intent of these regulations that the remainder of the lot either shall be undisturbed land or shall have been restored or stabilized in accordance with § 214-70C(13). Boundary stakes shall be maintained at all times for the purpose of inspection for compliance.
- C. No excavation or filling shall be permitted within 50 feet of a wetland or watercourse unless the applicant demonstrates that such excavation or filling will not adversely affect the water quality of such wetlands or watercourse or cause erosion of or sedimentation into such wetland or watercourse. The

applicant should be aware that a permit from the Somers Conservation Commission may be required in such cases.

- D. No activity connected with any excavation, removal or filling operation may be undertaken on any Sunday or any legal holiday; or earlier than 7:30 a.m. nor continue after 5:30 p.m. Monday through Friday; or earlier than 8:00 a.m. nor continue after 12:00 noon on Saturday. No processing of earth products shall take place on Saturdays. Processing of earth products in cases of emergencies may be granted by special permission of the Zoning Commission.
- E. As a condition for granting a special use permit, the Zoning Commission shall decide on the total number of acres to be excavated and the depth of the operation.
- F. Filling operations shall be carried on in such a manner as to prevent the breeding or harboring of insects, rats or other vermin, and to prevent the transport of fill or excavated material, or any waste or debris, off the premises by wind, water or other causes.
- G. No crushing or separating operations shall be permitted unless, after a public hearing is held, written approval is granted by the Zoning Commission.
- H. Failure to meet any requirement shall bar the issuing of a permit, regardless of whether such failure was caused by the applicant, any predecessor in title or any other person.

It is my understanding, and under the direction of our Town Attorney Carl Landolina, this regulation applies to excavation by any method, including blasting and/or jackhammering. An application was submitted on January 2, 2020 for a Special Use permit from the Zoning Commission


To date, due to the COVID-19 pandemic, the Zoning Commission has not scheduled a public hearing for your application, therefore, NO excavation shall be done. Concerns have been brought to the Town's attention regarding on-going excavation, noise, possible earth removal and heavy equipment entering and exiting the property.

You are hereby ordered to cease and desist the activity identified as a zoning violation upon receipt of this Order. Your failure to do so will result in further enforcement action. Connecticut General Statute Sec. 8-12 authorizes the institution of a lawsuit to enforce the zoning regulations and provides for the assessment of fines, penalties and costs.

You may appeal this Order to the Somers Zoning Board of Appeals in accordance with Section 8-7 of the Connecticut General Statutes. The appeal shall be filed with the ZBA in the Land Use Office located in Town Hall, 600 Main Street, Somers, CT. The appeal shall be filed no later than 30 days after your receipt of this Order. Failure to appeal this Order or correct the violation within the timeframe prescribed herein will result in the referral of this matter to the Town Attorney for legal action.

Should you wish to discuss this matter in more detail, please contact the Land Use Office directly.

Best Regards,


Jennifer Roy, CZEO
Zoning Enforcement Officer

Cc: Attorney Carl Landolina, Town Attorney
Attorney John Parks
C.G. Bud Knorr, Jr., First Selectman
Jill Conklin, Zoning Commission Chair
Jeffrey Bord, Director of Land Use



The Law Offices of John H. Parks

352A Billings Road, Somers, CT 06071 • Phone: 860-749-0797 • Fax: 860-749-0453

Via Email Only

Jill Conklin, Chairperson
Zoning Commission
Town of Somers
600 Main Street
Somers, CT 06071

Re: Withdrawal of Special Use Permit Applications, 40 and 42 Hallie Lane

Dear Chairperson Conklin,

Amy Eastman, the applicant for the two above-referenced Special Use Permit (SUP) applications, withdraws her applications.

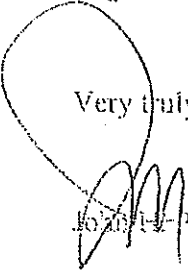
At the time they were submitted, we were unaware of the pattern and practice of the Zoning Commission (Commission) and the Zoning Enforcement Officer (ZEO) with regard to the excavation, removal, and filling of rock and soil on parcels where no material is brought into, or removed from, the property.

After receiving the Town Attorney's opinion letter of February 11, 2020, we undertook a review of the Somers Zoning Regulations (Regulations), the case law in Connecticut, and most importantly, the pattern and practice of the Commission and ZEO with regard to excavation, removal, and filling.

We engaged Dwight Merriam for his opinion and assistance in our review and investigation. His opinion letter and supporting affidavits are enclosed.

We have concluded that no SUP is required for the work currently underway on the two lots. It was unnecessary and, indeed, impermissible for the applicant to make SUP applications for this work. The Regulations, case law, and consistent pattern and practice of the Commission and ZEO with regard to property owner's excavating, removing within the limits of their property, and filling as part of landscaping, where no material is brought into, or removed from, the property leads to but one conclusion: Amy Eastman's work in breaking up rock and regrading soil on her two lots is as-of-right and not subject to any SUP requirements under your Regulations as you have consistently interpreted and applied them.

Very truly yours,


John H. Parks

Enclosures

Copy to (w/encls.):

Jennifer Roy, Somers Zoning Enforcement Officer

DWIGHT MERRIAM
Attorney at Law
80 Latimer Lane
Weatogue, Connecticut 06089
dwightmerriam@gmail.com
860-651-7077

April 29, 2020

John H. Parks, Esq.
Law Office of John H. Parks
352a Billings Rd
Somers, CT 06071-2022

Re: Amy Eastman, 40 and 42 Hallie Lane, Somers, Connecticut,

Dear John:

On behalf of your client, Amy Eastland, owner of the above-referenced lots ("40 Hallie" and "42 Hallie"), you have requested my review of the Town of Somers Zoning Regulations ("Regulations") to determine what permits are required pursuant to the Regulations to excavate rock and soil on 40 Hallie and 42 Hallie, where the rock and soil are not removed from either one of the lots, but are retained and utilized in sculpting the landscape and constructing stone walls. As part of this review, you have asked me to comment on the opinion by Somers Town Attorney Carl Landolina, dated February 11, 2020 ("Town Attorney's Opinion Letter").

This is a limited opinion in that it is restricted to a review of the Regulations, Connecticut case law, and the pattern and practice in the Town of Somers with regard the excavation of rock and soil, in the context in part of the Town Attorney's Opinion Letter.

I express no opinion as to what permits and approvals are required if blasting is used. I also express no opinion as to inland wetlands and watercourses. I note that you have informed me that no wetlands approval is required as all of the proposed activity is outside of regulated wetlands and watercourses and associated upland review areas and that appropriate soil erosion and sedimentation controls have been designed by a registered civil engineer and will be implemented.

Background

It is proposed to break up rock outcrops at 40 Hallie and 42 Hallie through mechanical means or by blasting and to independently regrade the two lots with the broken rock and other soil excavated in the process of breaking up the rock. It is estimated that over 1,000 cubic yards of earth products will be excavated and regraded on each of the two lots. 42 Hallie is approximately 40 acres and has the largest area of rock outcrop, a substantial portion of which would be used to construct stone walls on the property typical of the historic farming landscape in Somers. The same work would be undertaken at 40 Hallie. The regrading on both lots is in

support of plans to ultimately construct as-of-right accessory uses. 40 Hallie is in the Residential A-1 Zone and 42 Hallie is in the Residential A Zone.

In the summer of 2019, the Town of Somers Zoning Enforcement Officer ("ZEO") issued a cease and desist order alleging that the breaking up of the rock outcrop and retention of the material on-site either required certain zoning approvals, specifically a Special Use Permit ("SUP") (40 Hallie), or was wholly prohibited (42 Hallie). The ZEO later withdrew the cease and desist order for reasons not relevant to this opinion.

The Regulations

Relevant Provisions

§ 214-4 Definitions.

For the purposes of these regulations, the terms, phrases and words listed below have the meanings thereafter stated:

ACCESSORY BUILDING OR STRUCTURE

A supplemental building or structure, the use of which is subordinate or incidental to that of the principal building or structure and which is located on the same lot or a contiguous lot under the same ownership.

ACCESSORY USE

A use of land, or of all or a portion of a building or structure, which is subordinate or incidental to the principal use of the land, building or structure and which is located on the same lot as the principal use or on a contiguous lot under the same ownership.

EARTH REMOVAL

Removal of any kind of soil or earth matter, including topsoil, sand, gravel, clay, rock or similar material, or combinations thereof.

Article VI **Accessory Uses**

§ 214-38 Use; location; height regulations.

- A. Accessory structures customarily incidental to any use permitted herein are allowed, provided that such accessory structures shall not include any advertising signs, signboards or posters, except for small announcement signs or a farm name as provided under §§ 214-57 and 214-58.
- B. An accessory building, including those attached to a main building by means of a breezeway or a roofed passageway or other connection, shall not be used for residential purposes, except as specifically provided elsewhere in these regulations.
- C. A barn, stable or garage may be erected to the same height limits as the main building.

- D. Accessory buildings on a residential lot may include private garages in which not more than one space may be occupied by a commercial vehicle.

Article XII Earth Removal and Filling

§ 214-66 Purpose.

The purposes of this article are to preserve a cover crop on the land, to prevent erosion and to control any excavation or filling operations that may create a safety or health hazard to the public or the nearby property owners or be detrimental to the immediate neighborhood or to the Town of Somers.

§ 214-67 Special use permit required.

No excavation or removal of sand, gravel, clay, soil, humus, quarry-stone, rock or other earth materials and no filling of land shall be allowed in any zone without a special use permit, except as hereafter provided.

§ 214-68 Exemptions.

A special use permit shall not be required for the necessary and incidental excavation or removal of 1,000 cubic yards or less of material on or from a lot or parcel, or for any filling activity, only if such activity occurs in connection with one of the following:

- A. A bona fide construction or alteration of a structure for which a zoning permit or special use permit has been issued and the amount of material to be removed or filled has been approved by the Commission. Topsoil or loam may only be removed to the extent necessary to allow permitted building or other construction activities. Such topsoil or loam shall be retained on the property and shall be respread on the property following the completion of construction activities. Such topsoil and loam shall then be reseeded or otherwise stabilized to prevent erosion. Topsoil or loam may be removed from the property only if the applicant demonstrates to the Zoning Commission that such materials cannot be practically reused on the property.
- B. The landscaping of a lot having one or more existing structures. ...
- E. A bonded or otherwise secured subdivision approved by the Planning Commission.

§ 214-98 Area, yard and bulk regulations; permitted uses and accessory uses.

- B. Schedule of Permitted Uses.

Schedule of Permitted Uses

Primary Uses

Districts

A	A-1	B	I
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Schedule of Permitted Uses

Primary Uses		Districts			
7.	Removal of earth products	N	SU	SU	SU

C. Schedule of Permitted Accessory Uses.

Schedule of Permitted Accessory Uses

Permitted Accessory Uses		Districts			
		A	A-1	B	I
15.	Accessory uses and structures in accordance with § 214-4, Article VI, §§ 214-92 and 214-93 and this section	X	X	X	X

Interpretation of the Regulations

A fair reading of the Regulations requires defining terms not expressly defined: excavation, removal, and filling. The meaning of these terms is determined by the use in context and how the Zoning Commission ("Commission") and ZEO have applied them. Case law in Connecticut and elsewhere is not particularly helpful. Dictionary definitions may aid in determining common meaning.

"Excavation" is defined by Merriam-Webster to include "to dig out and remove." "Remove," again turning to Merriam-Webster, connotes taking away: "to change the location, position, station, or residence of" and "to move by lifting, pushing aside, or taking away or off." To dig out rock and soil is to excavate but excavate also includes removal and removal requires that the material be taken away. It is not "taken away" under the facts of this activity because it remains on the lot.

"Filling" is defined to describe, again following Merriam-Webster, "something used to fill a cavity, container, or depression." Sculpting the landscape to prepare it for the placement of permitted accessory structures, such as stone walls and outbuildings, including barns, is not filling a cavity.

Where the Town Attorney's Opinion Letter misses the mark in applying these commonly-held definitions is in the context of the regulatory scheme itself.

First, § 214-98.B.7 "Removal of Earth Products" can only mean an excavation leading to the transport of materials off-site. The provision does not apply to the proposed activity at either 40 Hallie or 42 Hallie because there is no removal and in both instances the work is an integral part of undertaking one or more of the enumerated accessory uses allowed as-of-right, namely, preparing the landscaping by sculpting to enable construction of accessory structures. Consequently, it is my opinion that this section does not apply to the proposed activity of rock and soil excavation on both 40 Hallie and 42 Hallie.

The Town Attorney's Opinion Letter concludes that there can be no excavation on 42 Hallie, even with a Special Use Permit, as he argues is required for 40 Hallie, because "Removal of Earth Products" is not a permitted use.

The Town Attorney's Opinion Letter states that Article XII is controlling. Article XII includes:

§ 214-67 Special use permit required.

No excavation or removal of sand, gravel, clay, soil, humus, quarry-stone, rock or other earth materials and no filling of land shall be allowed in any zone without a special use permit, except as hereafter provided.

The "hereafter provided" is a 1,000 cubic yard exemption from the Article XII Special Use Permit ("SUP") requirement only. The Town Attorney's Opinion Letter makes this clear in stating that: "Specific language as to how each use is regulated is found in the *particular* sections regulating those uses." (emphasis added).

The 1,000 cubic yard exemption is not a general exception from the rest of all of the requirements of the Regulations. It only applies, in the view of the Town Attorney's Opinion Letter, to Article XII. Pursuant to § 214-98.B.7, an SUP is not permitted for any "Removal of Earth Products" in the Residential A Zone. The Town Attorney's Opinion Letter equates the excavation referred to in § 214-67 "No excavation or removal" with § 214-98.B.7 "Removal of Earth Products." They are one and the same in the Town Attorney's Opinion Letter: excavation and removal and filling are all part of any activity that involves any movement of earth products.

This conclusion is facially untenable because it would not permit rock and soil in any amount to be excavated in the Residential A Zone under any conditions. This logically cannot be true. The illustration, *argumentum ad absurdum*, is that a homeowner who digs a post hole in the Residential A Zone violates the Regulations. Because the Town Attorney's Opinion Letter states that Article XII controls, there is no potential exemption from the SUP that is not permitted regardless in the Residential A Zone, even for excavation, removal, and filling under 1,000 cubic yards.

Second, if it does not apply to the excavation of earth products in the Residential A Zone where the work is either in furtherance of initial construction or subsequent improvements after-

the-fact, e.g. as-of-right accessory uses, then it does not apply in the Residential A-1 Zone either, where the excavated material is retained on-site.

The only way that § 214-98.B.7 "Removal of Earth Products" makes sense is if the principal use is the mining of earth products for transport and sale off-site. If it were otherwise, the same Special Use Permit requirement and exemptions would necessarily apply in all zones.

Sculpting of the landscape with excavated earth products originating on site is not filling, especially so under the facts of 40 Hallie and 43 Hallie where there are no cavities being filled and the rock will be used for stone walls.

Finally, Article XII Earth Removal and Filling, § 214-66 Purpose, is precatory and in no way controlling in defining the subsequent terminology used and applied in the regulatory provisions.

Estoppel

Case law in Connecticut and nationally is unhelpful to both the Town and the property owner in interpreting these definitions and the Regulations. Common dictionary definitions give some indication of what they should mean. In this instance, however, we fortunately have overwhelming, compelling, and incontrovertible evidence of what the definitions mean and how they are interpreted by the Commission and ZEO and applied under the Regulations.

Enclosed with this opinion are affidavits of a civil engineer and a former Somers town planner. Their sworn statements are based on a combined experience in town of more than half a century. They describe the scores and perhaps hundreds of individual lots and numerous developments over many years where the Commission and the ZEO have consistently treated excavation, removal, and filling of over 1,000 cubic yards on individual lots as unregulated activities, where the material has been retained on the lots.

This pattern and practice not only adds meaning to the definitions and their use in the Regulations, but it makes sense in the regulatory scheme intended to address mining for profit and massive undertakings involving large volumes of material hauled into sites and removed over town highways in caravans of large dump trucks.

My opinion, based on the enclosed sworn statements and the common law of equitable estoppel in zoning in Connecticut, See e.g., *West Hartford v. Rechel*, 190 Conn. 114, 459 A.2d 1015 (1983) (municipality could be estopped from enforcing its zoning regulations because of a long-standing pattern of unchallenged conduct), is that the ZEO is estopped from requiring any zoning approval of the proposed excavation, removal, and filling on 40 Hallie and 42 Hallie because the longstanding pattern and practice has been to allow such activities to be conducted as-of-right.

And even if the formal requirements for equitable zoning estoppel were not met, though I believe they are readily demonstrated, the pattern and practice followed by the Commission and ZEO serve to define the otherwise-not-defined terms that some might argue are ambiguous. In

short, my opinion is that "excavation" does not include breaking up rock and digging up soil if the material remains on the site. "Removal," in my opinion based on this pattern and practice, only refers to rock and soil taken from the site, not material remaining on the property. Finally, "filling," in my opinion, means to place rock and soil in evident holes and in below-grade depressions of some depth, and does not include sculpting for further development of a site, where no material is brought in from elsewhere.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dwight Merriam".

Dwight Merriam

Enclosures

STATE OF CONNECTICUT)
COUNTY OF TOLLAND) ss.
TOWN OF SOMERS)

APRIL 24, 2020

AFFIDAVIT

COMES NOW Patrice Carson being first duly sworn, under oath, and states that the following information is within her personal knowledge and belief:

1. I was the first Town Planner in the Town of Somers, Connecticut.
2. My resume includes the following:
 - a. Bachelor of Arts in Geography/Urban Studies-University of Connecticut
 - b. Managers in Government – University of Connecticut
 - c. American Institute of Certified Planners
 - d. Connecticut Association of Zoning Enforcement Officials
 - e. Connecticut Chapter of the American Planning Association
 - f. International City/County Management Association
 - g. Town of Somers Planning Department
 - h. Town of Coventry Planning Department
 - i. Pioneer Valley Regional Planning Commission
3. I was the Town Planner in Somers from September 1987 through June 2009.
4. As the Town Planner my work entailed, among other things, reviewing subdivision applications with:
 - a. The Somers Town Engineer
 - b. The Somers Town Attorney
 - c. The Somers Zoning Enforcement Officer
 - d. The Somers Wetland Enforcement Officer
 - e. The Somers Town Sanitarian
 - f. The Somers Planning Commission
 - g. The Somers Zoning Commission
 - h. The Somers Wetlands Commission
 - i. The Somers Zoning Board of Appeals
 - j. Various town officials
 - k. Various county and state officials
 - l. Various local developers and builders
 - m. Subdivision applicants
 - n. Subdivision applicants' surveyors
 - o. Subdivision applicants' engineers

- p. Subdivision applicants' soil scientists
- q. Subdivision applicants' attorneys

5. As Town Planner I became knowledgeable of:

- a. Somers Zoning Regulations
- b. Somers Subdivision Regulations
- c. Somers Inland Wetland Regulations
- d. Various land use state statutes
- e. Various land use regulations
- f. Various land use cases
- g. Various land surveying laws, terms and functions
- h. Reading and understanding survey plans
- i. Reading and understanding engineering plans
- j. Reading and understanding wetlands plans
- k. Blasting contractors
- l. Requirements relative to blasting of various types of ledge and rock relative to subdivision construction
- m. Local landscaping projects
- n. Field visits to subdivision construction sites
- o. Town Attorney opinions issued regarding the interpretation of the Somers Zoning Regulations in a variety of situations

7. For the majority of the time I was Town Planner, I also was a resident of the Town of Somers. After 2009 I continued to be a resident of the Town of Somers and I am a resident of the Town of Somers to this day.

8. In my capacity as Town Planner, I became familiar with ARTICLE XII of the Somers Zoning Regulations, §§ 214-66 to 214-76.

9. During my tenure as Town Planner, I attended the Somers Zoning Commission meetings.

10. During my tenure as Town Planner, the Staff of the Land Use Department as well as the members of the Somers Zoning Commission referred to Special Use Permits issued pursuant § 214-67 as Gravel Permits and the regulation of Gravel Permits was the only time that section of the Somers Zoning Regulations was used.

11. During my tenure as Town Planner, I attended and/or was involved in all of the Gravel Permits granted during that time period.

12. I am aware that some of the Gravel Permits granted during my tenure as Town Planner continued to have their Gravel Permits renewed by the Somers Zoning Commission utilizing the same permitting procedures that were in place during the time I was Town Planner.

13. I am aware of examples of earth excavation allowed by the Town of Somers that involved excavation or removal of more than 1,000 cubic yards of material on the lot or parcel that were not required to obtain Special Use Permits pursuant to § 214-67, because they were not gravel mining operations.

14. I have reviewed the Legal Opinion dated February 11, 2020, prepared by the Somers Town Attorney relative to §§ 214-4, 38, 66, 67, 68, 98 of the Somers Zoning Regulations.

15. During my tenure as Town Planner, neither the Somers Town Attorney, the Land Use Staff nor the Somers Zoning Commission ever applied the sections of Article XII in the manner or situation expressed in the February 11, 2020 Legal Opinion.

16. In the 22 years I served as Town Planner, I was also familiar with § 214-68 E of the Somers Zoning Regulations.

17. In the 22 years I was Town Planner, I was aware of more than 40 subdivisions approved by the Town of Somers Planning Commission.

18. None of the subdivisions the Planning Commission approved in the 22 years I was Town Planner were required to obtain Special Use Permits from the Somers Zoning Commission for earth products, excavation, removal, or filling pursuant to any provision of the Somers Zoning and Subdivision Regulations, including §§ 214-67 & 68 E of the Zoning Regulations.

19. In my experience in Somers and elsewhere, 1,000 cubic yards is not a large volume of material to be excavated, removed, and filled for an average lot in connection with the construction and landscaping work typically involved in most subdivisions, especially if the subdivision plan included the construction of a road.

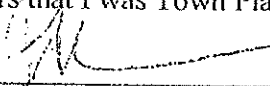
20. In the 22 years I was the Town Planner, the Somers Planning Commission never required any developer of a subdivision it approved to obtain a variance from the Zoning Board of Appeals to excavate, remove, or fill on a lot for any amount of rock and soil under any provision of the Somers Zoning Regulations, including §§ 214-68 E, where the material was retained on site.

21. The construction of many of the subdivisions approved by the Town of Somers Planning Commission in the 22 years I was Town Planner involved the excavation, removal, and filling of substantially more than 1,000 cubic yards of material.

22. If necessary, I can provide a much more detailed Affidavit specifying:

- a. Names of subdivisions
- b. Names of developers
- c. Names of parcels of property
- d. Names of surveyors
- e. Names of engineers

- f. Names of attorneys
- g. Names of town officials
- h. Names of subdivisions where blasting was done
- i. Calculations of cubic yards of rocks and soil excavated, removed, and filled in the 40, more or less, subdivisions approved by the Somers Planning Commission in the 22 years that I was Town Planner.



Patrice Carson

STATE OF CONNECTICUT)

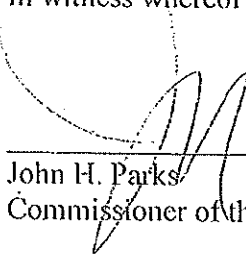
) ss. Somers

April 24, 2020

COUNTY OF TOLLAND)

On this the 24th day of April, 2020, before me, John H. Parks, the undersigned officer, personally appeared, Patrice Carson, known to me to be the person who subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand.



John H. Parks
Commissioner of the Superior Court

STATE OF CONNECTICUT)
COUNTY OF TOLLAND) ss.
TOWN OF SOMERS)

APRIL 29, 2020

AFFIDAVIT

COMES NOW James E. Ussery, Jr., being first duly sworn, under oath, and states that the following information is within his personal knowledge and belief:

1. I am a Land Surveyor licensed to practice in the State of Connecticut since 1987.

2. My resume includes the following:

AAS, Paul Smiths College 1975, Forestry/Land Surveying
Licensed Land Surveyor State of Connecticut
Member National Society of Professional Surveyors
Tolland County Director, Connecticut Association of Land Surveyors

3. I am a member of J. R. Russo & Associates, LLC, which is a firm that employs Land Surveyors and Professional Engineers, with an office located at 1 Shoham Road, Suite 3 in East Windsor, Connecticut.

4. Part of my work as a Land Surveyor involves representing land owners involved in a variety of land use projects before various land use commissions, including but not limited to, Zoning Commissions, Planning Commissions, Planning and Zoning Commissions, and Inland Wetlands and Watercourse Commissions in Towns throughout the State of Connecticut.

5. Part of my work representing land owners before various land use commissions in Towns throughout the State of Connecticut requires me to become familiar with both local land use regulations as well as a number of state statutes and regulations governing land use in the State of Connecticut.

6. My work on land use projects in various Connecticut Towns requires reading and discussing with the staff of that Town's Land Use Staff and sometimes the Town's Attorney the application of the Town's Subdivision and Zoning Regulations regarding my client's proposed uses of their land in those towns.

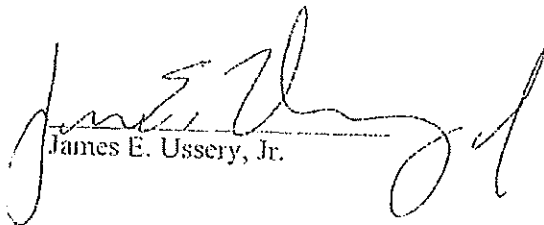
7. During my career, I have represented land owners in the Town of Somers before the Town of Somers' Zoning Commission, Planning Commissions, and Conservation Commission serving as the Inland Wetlands and Watercourse Commission on a regular basis since 1988.

8. Amongst other land use projects, over the years, I have represented land owners in the Town of Somers in both applications for subdivisions as well as applications for Special Use Permits for Earth Removal and Filling pursuant to ARTICLE XII of the Somers Zoning Regulations, §§ 214-66 to 214-76.
9. As with land use projects in any of the Towns I work in, with my Town of Somers land use projects, over the years, I have discussed the land use projects I have worked on with the Land Use Staff in the Town of Somers.
10. While working on Special Use Permit Applications for Earth Removal and Filling pursuant to ARTICLE XII of the Somers Zoning Regulations, §§ 214-66 to 214-76, the Staff of the Somers Land Use Department as well as the members of the Somers Zoning Commission referred to Special Use Permits issued pursuant § 214-67 as Gravel Permits and in my experience, that was the only time that section of the Somers Zoning Regulations has ever been used.
11. In the Town of Somers, Gravel Permits need to be renewed every year.
12. One of the Gravel Permit applications that my firm worked on was the Wood Gravel Permit, which was approved by the Somers Zoning Commission under the Earth Removal and Filling provisions of the Somers Zoning Regulations in 1988.
13. My firm has continued to represent the Wood Gravel operation since it was approved in 1988, which means my firm has been before the Somers Zoning Commission every year since 1988, that is 32 times.
14. In preparation for and attendance at all of those Somers Zoning Commission meetings, the Somers Zoning Commission members as well as the Staff of the Somers Land Use Department has consistently referred to both the original Special Use Permit Applications for Earth Removal and Filling pursuant to ARTICLE XII of the Somers Zoning Regulations, §§ 214-66 to 214-76, as well as all of the renewals under those sections as Gravel Permits applications and Gravel Permit renewals.
15. Many times when the Town of Somers Zoning Commission would schedule the renewal application for the Wood Gravel operation, it would schedule the renewal applications for the other gravel operations located in the Town of Somers for the same night. As a result, when I appeared before the Zoning Commission for my client's renewals, I witnessed the way the Zoning Commission handled all of the other gravel operations in the Town of Somers. The Somers Zoning Commission and Land Use Staff handled the other local gravel operations in the same manner they handled the Wood Gravel Permits and Renewals thereof.
16. I am aware of examples of earth excavation allowed by the Town of Somers that involved excavation or removal of more than 1,000 cubic yards of material on the lot or parcel that were not required to obtain Special Use Permits pursuant to § 214-67, because they were not gravel mining operations.

17. I have reviewed the Legal Opinion dated February 11, 2020, prepared by the Somers Town Attorney relative to §§ 214-4, 38, 66, 67, 68, 98 of the Somers Zoning Regulations.
18. The Town of Somers has had the same Town Attorney since the early 1990's.
19. In all of my work representing land owners in the Town of Somers concerning Earth Removal and Filling under the Somers Zoning Regulations, neither the Somers Town Attorney, the Land Use Staff nor the Somers Zoning Commission ever applied the sections of Article XII in the manner or situation expressed in the February 11, 2020 Legal Opinion.
20. In the 32 years I have worked representing land owners in the Town of Somers concerning subdivisions of their land, I was also familiar with § 214-68 E of the Somers Zoning Regulations.
21. In the 32 years I represented land owners in the Town of Somers concerning the subdivision of their land, I was aware of numerous subdivisions approved by the Town of Somers Planning Commission.
22. As far as I am aware none of the subdivisions the Planning Commission approved in the 32 years I have represented land owners in the Town of Somers concerning subdivisions of their land were required to obtain Special Use Permits from the Somers Zoning Commission for earth products, excavation, removal, or filling pursuant to any provision of the Somers Zoning and Subdivision Regulations, including §§ 214-67 & 68 E of the Zoning Regulations.
23. In my experience in Somers and elsewhere, 1,000 cubic yards is not a large volume of material to be excavated, removed, and filled for an average lot in connection with the construction and landscaping work typically involved in most subdivisions, especially if the subdivision plan included the construction of a road.
24. In the 32 years I have represented land owners in the Town of Somers concerning the subdivision of their land, the Somers Planning Commission has never required any of my developer clients of a subdivision it approved to obtain a variance from the Zoning Board of Appeals to excavate, remove, or fill on a lot for any amount of rock and soil under any provision of the Somers Zoning Regulations, including §§ 214-68 E, where the material was retained on site.
25. The construction of many of the subdivisions approved by the Town of Somers Planning Commission in the 32 years I represented land owners in the Town of Somers concerning the subdivision of their land involved the excavation, removal, and filling of substantially more than 1,000 cubic yards of material.

26. If necessary, I can provide a much more detailed Affidavit specifying:

- a. Names of subdivisions
- b. Names of developers
- c. Names of parcels of property
- d. Names of surveyors
- e. Names of engineers
- f. Names of attorneys
- g. Names of town officials
- h. Names of subdivisions where blasting was done
- i. Calculations of cubic yards of rocks and soil excavated, removed, and filled in the subdivisions I have been involved in over the 32 years I have represented land owners in the Town of Somers concerning the subdivision of their land.


James E. Ussery, Jr.

STATE OF CONNECTICUT)

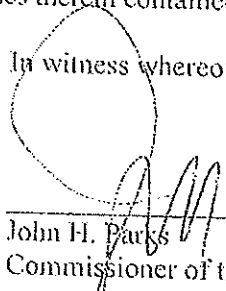
) ss. Somers

April 29, 2020

COUNTY OF TOLLAND)

On this the 29th day of April, 2020, before me, John H. Parks, the undersigned officer, personally appeared, James E. Ussery, Jr., known to me to be the person who subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand.


John H. Parks
Commissioner of the Superior Court